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U.S. Citizenship
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Services

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File: [REDACTED] Office: TEXAS SERVICE CENTER Date: JUL 13 2007
SRC-06-033-51662

In re: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a convenience store and gas station, and seeks to employ the beneficiary permanently in the United States as a manager, retail store (“Night Manager”). The petitioner seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. The petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director’s March 7, 2006 decision, the case was denied as the director determined that the petitioner did not demonstrate its ability to pay the beneficiary the proffered wage.¹ Further, the petitioner did not demonstrate that the beneficiary had the required work experience for the position.²

¹ The petitioner is structured as a sole proprietorship. A sole proprietor is a business in which one person operates the business in his or her personal capacity. Black’s Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore, the sole proprietor’s adjusted gross income, assets and personal liabilities are also considered as part of the petitioner’s ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff’d*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary’s proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner’s gross income.

² In evaluating the beneficiary’s qualifications, Citizenship and Immigration Services (“CIS”) must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition’s priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing’s Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To document a beneficiary’s qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(1)(3).

On appeal, the petitioner provided that, “the U.S. Citizenship and Immigration Service erred in denying the applicant’s I-140, Immigrant Petition . . . because the petitioner has the ability to pay the proffered wage to the applicant, notwithstanding his ability to provide for his own family.” Counsel further provided, “the applicant is well-qualified for the position of night manager based on her prior employment abroad in a similar capacity. Additional evidence in support of this appeal will be forwarded in 30 days.”

The appeal was filed on April 5, 2006. As of this date, more than fifteen months after filing the appeal, the AAO has received nothing further. On May 31, 2007, the AAO sent counsel a fax allowing the petitioner to supplement the record with a brief as originally indicated. Counsel responded that he did not file a brief as indicated on Form I-290B, and did not provide any documentation to support the appeal.

As stated in 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

The petitioner here has not addressed the reasons stated for denial and has not provided any additional evidence related to either issue for denial. The petitioner fails to provide additional evidence, or demonstrate an incorrect interpretation of the prior evidence submitted, to show that the sole proprietor can pay the proffered wage, and support the sole proprietor’s family of five. Further, the petitioner has failed to provide the secondary evidence necessary to overcome the inconsistencies in the record and properly document the beneficiary’s prior experience to show that she met the requirements of the certified Form ETA 750. Further, the petitioner has failed to identify the specific erroneous conclusion of law. The appeal must therefore be summarily dismissed.

ORDER: The appeal is dismissed.

The Form ETA 750A job offer required that the beneficiary have two years of prior experience as a Night Manager. The beneficiary failed to list any prior experience on Form ETA 750B. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board’s dicta notes that the beneficiary’s experience, without such fact certified by DOL on the beneficiary’s Form ETA 750B lessens the credibility of the evidence and facts asserted.

As the beneficiary had not listed any experience on Form ETA 750B, the director questioned the letter provided to document the beneficiary’s experience. The letter provided that she obtained the required experience abroad where she worked from May 3, 1993 to December 19, 1999. The director requested secondary evidence in the form of the beneficiary’s tax returns or paystubs to verify the claimed experience. No documentation was submitted.